Adoption, Ratification and Entry Into Force

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Article IV-8 Draco[1]

General remarks

The provision relating to the adoption, ratification and entry into force of the Treaty establishing the Constitution for Europe is probably one of the most difficult ones, both in legal and political terms. It is supposed to define the legal nature and quality of the entire EU process in its present and future phase. There is an inherent ambiguity about the legal nature of the treaty, which is already apparent in the title, and there are profound political implications as well. Is the Treaty establishing a Constitution for Europe a treaty or a constitution? Can it be both or neither? These are hard questions indeed.

Basically, a treaty is a contract between two or more state parties, which can only enter into force if agreed upon by every single party. Unanimity is the universal rule of adoption and amendment of treaty provisions. A constitution on the other hand is not a contract but a statute, the fundamental law of the political body it constitutes.

The way a constitution is adopted is not important for its legal significance. Constitutions are not constitutions because they say so, or because they have been enacted by a wise leader, imposed by a ruling party, adopted by a democratic parliament or approved by the people itself. Constitutions are superior to any other act within a given legal order, because – and if – they can only be amended according to a qualified procedure. It is because a constitution is '*unchangeable by ordinary means*' that it may pretend to be '*the supreme law of the land*' (John Marshall). Thus, it is the amendment procedure, not the adoption

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[1] All references in the text are to the Convention's Draft Constitution of 18 July 2003 (here Draco) unless identified otherwise. The Constitution's provisions have been renumbered upon its conclusion. The final numbering was not yet established at the time of printing.

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or ratification procedures that is decisive for the very existence of a constitutional scheme.

Can a treaty give birth to a constitution? Could it be that a contract changes its legal nature in order to become a statute, a unilateral norm, and superior to all others? The answer is yes, if the treaty provides for an amendment procedure different from normal treaty making, to wit, allowing a change by non-unanimity yet binding for all. In other words, Article IV-8 does not and cannot be solely responsible for the treaty eventually becoming a formal constitution. But, of course, Article IV-8 is fully responsible for accomplishing the first step of that process by defining ratification and entry into force.

Adoption

The draft Treaty establishing a Constitution for Europe was drawn up by the European Convention and achieved a broad consensus on 13 June 2003. The Heads of State and government at the European Council Summit of 18 June 2004, agreed to the Treaty.

Ratification

The notion of ratification seems to be contrary to the very idea of a constitution. While treaties are ratified, constitutions are approved. Yet, the ratification of Draft Constitutions by the constituent units has been quite a common feature in the history of federal type state constructions (US 1787/1788, Switzerland 1848, Germany 1949).

The core principle underlying ratification of the constitutional treaty is the referral to the constitutional requirements of the Member States. Thus the legal order of the Union leaves it to the legal order or to the political process of the Member States to determine the competent body for ratification of its fundamental law. The formula has a tradition going back to the first EC treaties, actually enshrined in Article 48 EU Treaty. Its general expression can be found in the Vienna Convention on the Law of Treaties (Article 11).

As a general rule, the constitutional treaty has to be submitted and approved by each of the twenty-five national legislatures. It is during this stage that the referendum device plays an increasingly important role. Beginning in 1986, a small number of countries have indeed submitted revisions of the original EC treaty to popular approval. This has led to negative results (Denmark 1992 on Maastricht, Ireland 2001 on Nice) that threatened the integration process and could only be overcome by a new referendum. In more than half of the twenty-five Member States, the constitutional treaty will have to be approved by refer-

endum, either according to binding constitutional provisions or as a result of a political decision taken by the government.

Referendums are, of course, known to be quite efficient legitimacy-producing devices. In this sense, it would appear that the need for a stronger legitimacy of the Union could quite easily be satisfied by a generalisation of referendums on issues related to the European integration process. This, however, is only partly true.

Issues such as membership of the Union and adherence to the single European currency typically and specifically relate to national sovereignty where the need for legitimacy is particularly strong and where the referendum seems to be an appropriate legitimating instrument. Nine out of the ten new Member States have acceded to the EU through a popular vote, as did many other Member States, beginning with Ireland and Denmark in 1972.

National referendums on the constitutional treaty, just like the national referendums that have been organised on the Single European Act, Maastricht and Nice, are different. Even though their immediate object is the treaty, they tend to concentrate on national political issues and often turn into some kind of plebiscite for or against incumbent governments. Furthermore, the decision that will be taken by the voters on ratification of the constitutional treaty does not only affect the voters and their country. Combined with unanimity rule for entry into force, it threatens the whole integration process. A negative answer, be it only by an insignificant majority, means in law that there will be no constitution. As a matter of fact, 'European referendums' on the constitution are neither European nor democratic. They are not European, because their legal bases lie within national constitutional provisions or national political decisions. They are not democratic, for how can one justify that that the vote of a few thousand citizens in a single Member State could block over 450 million European citizens and the rest of the governments from adopting a constitution? They are even less democratic if they have to be repeated, because the outcome was negative as occurred in Denmark in 1993 and in Ireland in 2002.

What then is the difference between a parliamentary and a popular refusal of the constitutional treaty? It must be found in accountability. Elected bodies such as parliaments and governments are generally accountable for their decisions. They can be challenged by those who put them into office. Voters cannot. Popular decisions can only be overturned by new popular decisions. Nobody is responsible and accountable for it, because each citizen has the right to vote as he chooses, without having to justify or even disclose the way he voted.

There is a case for arguing that, despite the reference in Article IV-8 to the constitutional requirements of the Member States, EU law does pose some im-

plicit limits to state sovereignty in defining the ratification procedure. Those limits lie within the Union's values, such as those that are stated in Article 6 EU and Article I-2 of the constitutional treaty, mainly concerning the rule of law and democracy. The EU could hardly accept that a state empowers a junior minister to ratify on his own account the constitutional treaty. Such a decision would lack democratic legitimacy. Does not the same hold for national referendums? How long can the Union continue to accept that the decision relating to its fundamental law be taken by electoral bodies which are national, not European and, in their essence, unaccountable for anything they decide?

Of course, a truly European referendum, provided for in the constitutional treaty itself, making each European citizen a member of a common European electoral body, could have the last say on adoption and revision and confer the lacking democratic legitimacy to the constitutional treaty. This is not, however, the ratification and amendment formula which has been retained by the convention.

Entry into force

The core principle underlying entry into force is the unanimity rule. It is only if and when all the instruments of ratification have been deposited that the constitutional treaty may and will enter into force. Thus, every one of the twenty-five Member States has a decisive veto power on the ratification process. Delegated to the people, this veto power becomes a kind of 'referendum roulette' that increases the probability of accidental negative decisions blocking the adoption of the constitution.

There have been various attempts to circumvent the unanimity rule and break up the traditional vision of the constitutional treaty as being a mere revision of the existing treaties. With enlargement and the increased use of popular referendums it becomes obvious that strictly to maintain unanimity means to condemn the constitutional project. Unlike the American Constitution of 1787, the constitutional treaty does not solve the problem by openly replacing unanimity by majority rule (comp. Article VII of the US Constitution).

But there is at least a window that might be opened in case of emergency. According to the 'Declaration in the final act of signature of the treaty establishing the constitution', the European Council will have to decide what happens to the constitutional treaty if four fifths of the Member States have ratified it within two years from its signature and if one or more Member States '*encounter difficulties*' in proceeding with ratification. This is not, of course, a legally valid delegation to replace the basic requirements of international law relating to treaty revision. But the final declaration does open a possibility for the con-

stitutional treaty to enter into force even though some members have not (yet) ratified it. It is not a revolutionary act by itself but an invitation to adopt, if necessary, such an act.

There are, after all, far more examples of constitutions based on some singular revolutionary act allowing them to enter into force than of constitutions that are enacted according to the formal requirements of international law.

Question

How long can the Union continue to accept that the decision relating to its fundamental law is to be taken by electoral bodies, which are national and not European, and, in their essence, unaccountable for anything they decide?

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